IN THE COURT OF JUDICATURE AT BOMBAY

ORIGINAL SIDE JURISDICTION

WRIT PETITION NO.1943 OF 2004

Indian Airlines Ltd ...Petitioners
vs.
...Respondents
S.N. Haridas

Sudeep Dasgupta i/by.Chhaya Shah
for the petitioners.
None for the respondents.

CORAM: S.C.DHARMADHIKARI, J.

JANUARY 8, 2007.

P.C :-

1. Heard Mr. Dasgupta appearing for the petitioner.

2. Mr. Dasgupta, states that in pursuance of the order passed by this court on 25.11.2004 service was effected on the respondent employee in addition to post by publication. The notice has appeared in 'Hindustan Times', New Delhi dated 9.1.2005. The Respondent employee is residing at New Delhi. In such circumstances according to Mr.Dasgupta, the service on the respondent is complete.

3. With the assistance of Mr.Dasgupta, I have perused the orders dated 25.11.2004 and 23.2.2005. This court has already recorded that the petitioners have taken steps for substituted service. I have also been taken through the Affidavit of one Vijay Kumar. I am therefore satisfied that the service on the Respondent is complete.

4. None appears for the respondent though served.

5. This petition under Article 226 of the Constitution of India is directed against the order dated 18.6.2004 passed by the National Industrial Tribunal, Mumbai in Approval Application No. 27 of 1998 which arises out of Reference No. NTB No.1 of 1990.

6. By the order under challenge the approval sought from the Presiding officer of the National Industrial Tribunal and CIGT, Labour court, Mumbai has been denied. In other words, the learned presiding officer refuses to put his seal of approval on the

order of dismissal. The reason assigned is that the same is not in accordance with the standing orders.

7. The facts which are not in dispute are that the Respondent workmen was employed by the Petitioner and at the relevant time was working as Traffic Assistant. In the application seeking approval filed invoking the provisions of Section 33(2)(b) of the Industrial Disputes Act, 1947 (for short I.D.Act) the petitioners alleged that the respondent was on privilege leave between 17.7.1995 to 16.8.1995. The respondent despite being on leave entered restricted area on 14.8.1995. This entry was without any legal authority. Not only that but the Respondent proceeded to issue illegal tickets by using the Agent code of another employee. A chargesheet was issued showing that the workmen entered the Mini booking office of the Company and issued four tickets costing Rs.71,000/-. When the tickets were issued to cashiers cabin, it was found that there was no impression/revalidation on the MCO. Upon inquiries made by the cashier, it was alleged that the Respondent workmen walked away. The matter was

reported to Manager, Delhi Airport. The Agent Code 767 of the co-employee was also referred to. In these circumstances, the Respondent workmen was charged under the Standing Order (Regulations) for breach of Clause 1 and Clause 16(4) as applicable to him.

8. The charge-sheet was duly served but no reply was filed to the chargesheet. Inquiry was ordered by competent authority on 16.8.1996. The Workmen did not appear during the inquiry. A reminder letter/notice was issued to him to appear on 13.3.1997. Despite receipt of the letter/notice dated 12.2.1997, the Workmen did not appear. The inquiry therefore proceeded ex-parte. The ex-parte inquiry proceedings were also forwarded to the workmen by covering letter dated 18.3.1997. He was served with the copy of the Inquiry Report and a Show Cause notice was issued to him calling upon him to show cause as to why appropriate punishment in accordance with the Regulations applicable to him should not be imposed. The proposed punishment was Removal from service. Two replies were forwarded by

the workmen on 8.9.1997 and 12.9.1997. The Petitioner not satisfied with the explanation and replies of the Respondent proceeded to remove him from the service and an order dated 20.5.1998 to that effect was passed. The order was duly communicated and alongwith the said order a cheque of Rs.11,332/- towards one month wages was also forwarded. Thus, the petitioner's case is that Section 33(2)(b) of the I.D.Act was complied with. An application was filed seeking approval in terms thereof on 29.5.1998.

9. This application was registered by the Tribunal as above. The Workmen was served with the copy of the same and he filed Written Statement.

10. The plea of the Workmen in the Written Statement is that on identical allegations the Petitioner registered an FIR against him at the local police station and in pursuance of the same investigations were concluded and chargesheet was filed in a competent criminal court. The domestic inquiry was void and illegal. According to him some proceedings were also pending in the Delhi High

court. In additon, the Workmen raised a plea that the chargsheet was vague and defective. The ex-parte inquiry was void and illegal. The findings arrived at therein are perverse.

11. The only other contention which is raised is that the cheque amount forwarded is not the last pay drawn by the Respondent. In any event, the cheque was drawn on 19.5.1998. The order of dismissal is dated 20.5.1998. Thus, prior to the dismissal order being passed and issued, the cheque was kept ready. This advance preparation violates the provision of the I.D.Act. A rejoinder was filed by the Petitioner denying the aforesaid allegations.

12. It appears that the Tribunal proceeded on the basis that the workmen admitted the Petitioner’s stand and did not want to raise any dispute regarding payment of one month wages. The Petitioner did not lead any evidence and relied upon documents. The Workmen filed his own Affidavit in lieu of examination-in-chief. He was cross-examined by the Petitioner.

13. The Tribunal examined the application on the questions termed by it as preliminary points. By the impugned order, it denied relief to the Petitioner i.e. the approval in terms of the aforementioned statutory provision.

14. Being aggrieved and dissatisfied with this order, the present petition has been filed. Mr.Dasgupta, learned counsel appearing for the petitioners, submits that this court while admitting the present Writ Petition proceeded to grant interim relief in terms of prayer clause (b) of the same. He submits that prayer clause (b), is for stay of the impugned order. In other words, the order was stayed by this court while admitting the petition and the stay has continued throughout. In the light of the stay granted by this court to the impugned order, the order of dismissal stands and even the approval is deemed to have been granted. In any event, according to Mr.Dasgupta, the Presiding Officer has committed an error apparent on the face of the record and his conclusion can safely be termed as perverse.

15. Mr.Dasgupta, has invited my attention to the impugned order and the observation therein at paragraphs 9 and 10. The Tribunal has concluded that the authority which passed the order of dismissal was competent to pass the same. Mr.Dasgupta, has then invited my attention to paragraph 11 of the impugned order and he submits that the Tribunal has held that even the chargesheeet is not defective in as much as the authority framing the charges was not biased and incompetent to frame the same.

16. Mr.Dasgupta, submits, that in paragraphs 12 and 14 in the order passed by the Tribunal, it is recorded that the material produced by the Workmen does not advance his case any further. Once the chargesheet was found to be not defective, so also the Inquiry itself being proper, then, merely because the cheque was prepared, allegedly on the prior date, the Tribunal could not have refused approval, is the submission of Mr.Dasgupta.

17. Section 33 of the I.D.Act reads thus :-

"33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.

(1) During the pendency of any conciliation proceedings before a conciliation officer or a Board or of any proceeding before [an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of any industrial dispute, no employee shall-

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute,

save with the express permission in writing of the authority before which the proceeding is pending;

(2) During the pendency of any such proceeding in respect of any industrial dispute, the employer may, in accordance with standing orders applicable to a workmen concerned in such dispute,[or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman]-

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b) for any misconduct not connected with the dispute, discharge

or punish, whether by dismissal or otherwise, that workman :

PROVIDED that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer

(3) Notwithstanding anything contained in sub-section (2) no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute-

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceeding; or

(b) by discharging or punishing, whether by dismissal or otherwise, such protected workman,

save with the express permission in writing of the authority before which the proceeding is pending.

18. The Ambit and Scope of the power conferred by the proviso to Section 33(2)(b) of I.D.Act has been subject matterof several decisions of the Hon’ble Supreme Court. In AIR 1958 SC Page 79 (Martin Burns Ltd vs. R.N.Bannerji) the Hon’ble Supreme Court observes thus :-

"21. Re:(ii) It was next contended that even though the Labour Appellate Tribunal had jurisdiction to hear an application under Section 22 of the Act it misconceived its jurisdiction and in the exercise of it, launched into an inquiry which it was not competent to do and erroneously came to the conclusion that the appellant had failed to make out a prima-facie case for terminating the service of the respondent.

22. The nature and scope of the enquiry before the Labour Appellate Tribunal under Section 22 of the Act has been the subject matter of decisions of this court in Atherton West & Co. Ltd. v. Suti Mill Mazdoor Union, 1953 SCR 780 : (AIR 1953 SC 241) (C). The Automobile Products of India Ltd v. Rukmaji Bala, 1955-1 SCR 1241 : ((S) AIR 1955 SC 258) (D) and Lakshmi Devi Sugar Mills Limited v. Ram Sarup, 1956 SCR 916 : ((S) AIR 1957 SC 82) (E). In the last mentioned case this Court succinetly laid down the principles governing such enquiry and observed at p. 935 (of SCR): (at pp.93-94 of AIR):

> "The tribunal before whom an application is made under that section, has not to adjudicate upon any industrial dispute arising between the employer and the workman but has only got to consider whether the ban which is imposed on the employer in the matter of altering the conditions of employment to the prejudice of the workman or his discharge or punishment whether by dismissal or otherwise during the pendency of the proceedings therein referred to should be lifted. A prima facie case has to be made out by the employer for lifting of such ban, and the only jurisdiction which the Tribunal has is either to give such permission or to refuse it provided the employer is not

> acting mala fide or is not resorting to any unfair practice or victimization."
>
> (27) The Labour Appellate Tribunal had to determine on these materials whether a prima facie case had been made out by the appellant for the termination of the respondent's service. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a prima facie case had been made out the relevant consideration is whether on evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidenced. It may be that the Tribunal considering this question may itself have arrived at a different conclusion. It has, however, not to substitute its own judgment for the judgment in question. It has only got to consider whether the view taken is a possible view on the evidence on the record (See Buckingham & Carnatic Co.,Ltd v. The Workers of the Company, (1952) Lab. AC 490(F).

. These observations have been quoted with approval in a recent decision reported in AIR 2005 SC 570 (see paras 13 & 18) (Cholam Roadways Ltd vs. ThirungnamSambandam)

19. A bare perusal of sub-section 2(b) indicates

that it is part of Section 33 stating that conditions of service etc. to remain unchanged in certain circumstances during the pendency of proceedings. Sub-section 1 enacts that during the pendency of any conciliation proceedings before the conciliation officer or a board or of any proceedings before the Arbitrator or a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall take steps stipulated in Sub-Clause (a) and (b) of Section 33(1). Sub-Section 2 states that during the pendency of any such proceedings in respect of an industrial dispute, the employer may in accordance with the Standing orders applicable to a Workmen concerned in such dispute or where there are no such standing orders in accordance with the terms of the contract, whether express or implied, between him and the worker, alter with regard to any matter not connected with the dispute, the conditions of service applicable or for any misconduct not connected with the dispute, discharge or punish whether by dismissal or otherwise of that Workman. The proviso to Section 33(2)(b) makes it clear that such Workmen shall not be discharged or dismissed if

he has been paid wages for one month and an application has been made by the employer to the authority before which the proceedings are pending for approval of the action taken by the employer.

20. From reading of the impugned order, it is apparent that the Workmen does not dispute receipt of wages for one month. There is no dispute that an application has been duly made seeking approval for the action against the respondent. However, despite observing that the charge is not defective and the inquiry is not vitiated in any manner, merely, because the cheque was kept ready, prior to the dismissal order being passed and served, the approval could not have been refused. In the peculiar facts of this case, the plea raised by the workmen in this behalf should not have been accepted.

21. I have with the assistance of Mr.Dasgupta perused the impugned order. In the conclusions recorded in each of the paragraphs prior to paragraph 13, the Tribunal negatived the contentions of the Workmen. These contentions pertain to the

chargesheet being defective and bias of one Naresh Chand. In these circumstances, there was no warrant in accepting the plea, that the order of dismissal is vitiated as the management has prejudged the guilt of the respondent. The Tribunal has proceeded on the basis that Naresh Chand was not examined before the Tribunal. The Workmen does not dispute compliance with the provisions pertaining to payment of one month wages. The cheque being kept ready alone is taken as a factor for prejudging the guilt. In my view, merely because the Petitioner did not examine anybody to explain in what circumstances, the cheque was prepared a day before the dismissal order was passed does not mean that the allegation of the Workmen is proved and deserves to be accepted. The Petitioner has specifically pointed out that the principles of natural justice were fully complied with. The explanation pertaining to the charges was duly considered.

22. Once the Tribunal came to be conclusion that the charges were completely proved, then in the present facts and circumstances there was no warrant

for withholding the approval. More so, when no prejudice is caused to the workman-Respondent by a cheque being forwarded bearing a date prior to the order of dismissal.

23. There is much substance in the contention of Mr.Dasgupta that the order passed by the Tribunal is vitiated by an error apparent on the face of the record and can safely be termed as perverse.

24. Hence, despite the Workmen being not present before me, I have perused the petition and the annexures in great detail. In my view, the impugned order cannot be sustained. It has already been stayed during the pendency of the present petition.

25. For the above reasons, Rule is made absolute in terms of prayer clauses (a) and (b). The order dated 18.6.2004 is quashed and set aside and the Application for Approval preferred by the Petitioner is allowed.

sd/-

(S.C.DHARMADHIKARI, J)